

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-072 36 7734
Issued to: Robert J. MILICI

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2159

Robert J. MILICI

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.301.

By order dated 2 February 1977, an Administrative Law Judge of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for two months outright plus four months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as an able bodied seaman on board the United States SS TRANSINDIANA under authority of the document above captioned, on or about 25 June 1976, Appellant assaulted and battered another member of the crew, one Horace Serrette, also an AB seaman.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records and the testimony of Horace Serrette.

In defense, Appellant offered in evidence his own testimony.

Later, the testimony of one Morales, taken by deposition on written interrogatories, was entered in evidence by the Investigating Officer.

After the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of two months outright plus four months on twelve months' probation.

The entire decision was served on 14 February 1977. Appeal was timely filed and perfected on 7 November 1977.

FINDINGS OF FACT

On 25 June 1976, Appellant was serving as AB seaman on board the United States SS TRANSINDIANA and acting under authority of his

document while the ship was at Guantanamo Bay.

On 25 June 1976, Appellant did wrongfully assault and batter Horace E. Serrette, a member of the ship's crew.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge.

Appellant contends that there was no substantial evidence in the record to support the findings, that untimeliness of decision-making amounts to denial of due process, and that there was an effective denial of counsel on the hearing that also amounted to denial of due process.

APPEARANCE: Peter S. Zeiler, Esq., New York, New York.

OPINION

I

An Appellant who obtained not only a delay in the opening of the hearing in his case but a change of venue granted for the purpose, in part, of retaining counsel at a convenient place, and who is thereafter represented throughout the proceeding by professional counsel of his own choice, is not likely to be heard with instant sympathy when he attacks for the first time on appeal the performance of the selected counsel. The assertion is made here that evidence of Appellant's medical condition which was available at the time was not brought forward, when it would have had a strong bearing on the findings.

The "missing" evidence has been available on this review. It must be said that its desired probative effects, a belief that Appellant was seriously injured in his encounter with his alleged victim, would not have necessarily followed if the evidence were viewed most favorably to Appellant. More important, however, is the fact that at two points the medical record now presented contains an undisguised suspicion by the examining physician that unverifiable symptoms asserted by Appellant were in fact a creation stimulated by the prospect of the very hearing in this case which was just about to begin.

Counsel on the hearing could well have made an informed justifiable choice, to avoid adverse opinion and, at least, a weakening of position, in deciding not to spread the medical report on the record. Appellant clearly cannot seek now to turn this into, in effect, a charge of professional negligence or

incompetence in his representation.

II

In reference to the alleged "untimeliness" of the decision-making here, Appellant cites 46 CFR 5.20-175, and points out that all the testimony of live witnesses had been heard by 5 August 1976, that a postponement granted on that date was for the purpose of obtaining a deposition of a witness desired by the Investigating Officer, that when the deposition was available on 7 October 1976 it proved to have only two pages containing "nothing of great significance," and that nevertheless no decision was forthcoming until 2 February 1977.

Appellant is correct in his contention that subsection (a) of the applicable section of the regulations contemplates as the usual course the announcement and service of a decision in open hearing. It is also clear that the allowance of service by mail is provided for those cases of such a nature that the time needed for review of the record might render inconvenient to those participating a reconvening only for the purpose of serving the decision in person. Nevertheless, the objective of speedy disposition is not so overriding as to dictate a fixed period of time within which decision must be rendered. The regulation does not purport to do so and therefore a showing of prejudice arising from an unseemly delay must ordinarily be expected to support a claim of denial of due process such as to void the proceeding.

There has been no such showing here. Appellant himself claims to have been unfit for service until mid-September 1976. He was free to take employment at any time thereafter and has not claimed any impairment of employability as the result of the lapse of time before decision was entered.

III

Lastly, Appellant claims that the decision of the Administrative Law Judge was based upon a record lacking substantial evidence and composed primarily of "hearsay and circumstantial evidence." Several alleged inconsistencies between the evidence presented at the hearing and the findings of the Administrative Law Judge are referred to by Appellant in support of this argument. The two major points stressed by Appellant will be discussed below.

At the outset, it must be remarked that the Administrative Law Judge's decision basically consists of a weighing of the conflicting testimony of the two witnesses at the hearing -- Appellant and the alleged victim, Mr. Serrette. Indeed, as there

were no other witnesses to the actual incident, the decision in this case hinges upon the credibility of these two men. As I have stated many times before, questions involving the credibility of a witness are best decided by the trier of fact who presides over the hearing. The Administrative Law Judge, being able to hear the testimony first-hand and to observe the appearance and demeanor of the witnesses, is generally far better equipped to make determinations of credibility than is any appellate body. Consequently, appellate review of this type is limited in scope. Absent a clear showing of arbitrary and capricious action by the trier of fact concerning this issue, his determination will not be disturbed.

In the instant case, the Administrative Law Judge found that while there were "a number of serious and revealing weaknesses in [Appellant's] testimony", the testimony of Mr. Serrette "was clear ...logical...devoid of inconsistencies...and was not impeached on cross examination" Appellant strenuously argues that the Administrative Law Judge was incorrect in finding that the injuries sustained by Appellant were "much more consistent" with Mr. Serrette testified that he placed Appellant in a wrestling hold commonly known as a "full nelson", in order to subdue him. The Administrative Law Judge found this testimony completely consistent with the report of a physical examination of Appellant performed at the U.S. Naval Hospital at Guantanamo Bay shortly after the incident. (I.O. Exhibit 4.) The medical report indicates that Appellant sustained multiple contusions and hematomas on the bi-lateral occipital/cervical region of the head and contusions on the frontal region of the scalp. On review, it seems that Appellant prefers to see only part of this medical report, as the diagnosis of bruises to the occipital/cervical region directly contradicts Appellant's contention that injuries occurred to the front of the head only, and directly supports the findings of the Administrative Law Judge.

Appellant also objects to the Administrative Law Judge's use of evidence contained in the deck log of TRANSINDIANA for 25 June 1976. (I.O. Exhibit 2a.) Specifically, reference is made to a statement of Mr. Serrette, recorded in the log, concerning a prior incident involving Mr. Serrette and Appellant. The log entry was perceived by the Administrative Law Judge as suggesting a potential source of animosity between Appellant and Mr. Serrette, and perhaps suggesting that Appellant sought a confrontation with Mr. Serrette. Appellant argues that the log entry, as "hearsay" evidence, was inadmissible and that the use of such evidence by the Administrative Law Judge was reversible error.

An entry into the Official Log of a vessel is always admissible in evidence at hearing of this type. 46 CFR 5.20-107.

The weight to be given to log entries is a matter governed by the provisions of 46 CFR 5.20-107, the circumstances of the particular case, and the discretion of the administrative law judge. The log entry in the instant case was not used by the Administrative Law Judge as prima facie evidence supporting the allegations made in the charge or specification; rather, it was only one of the many factors considered by the Judge in determining the credibility of the two witnesses at the hearing. It should be noted that the log entry was admitted into evidence at the hearing without objection. It also should be noted that Appellant relies upon other portions of the same log entry to support his arguments on other points in his brief. If the log entry is to be accepted as proper evidence on points which Appellant considers favorable to his position, it must be accepted with respect to unfavorable points as well. In sum, weighing all the evidence presented by the record as a whole, I cannot say that the Administrative Law Judge's tangential reference to this portion of the log entry was improper or unduly prejudicial to Appellant.

IV

The disposition of this case was determined by the cardinal issue of credibility -- a determination properly committed to the sound discretion of the Administrative Law Judge. I find that the case record, viewed as a whole, contains substantial evidence of a reliable and probative nature to support his decision.

ORDER

The order of the Administrative Law Judge entered at New York, New York, on 2 February 1977 is AFFIRMED.

R.H.SCARBOROUGH
VICE ADMIRAL, UNITED STATES COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 15th day of August 1979.

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